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FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

BEFORE THE FEDERAL ELECTION COMMISSION

2005 AUG 24 A 11: 10

In the Matter of

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MUR 5453

James S. Paolino

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**SENSITIVE**

GENERAL COUNSEL'S REPORT # 11

**I. ACTIONS RECOMMENDED**

Enter into conciliation with Respondent prior to a finding of probable cause to believe in connection with 2 U.S.C. §§ 441a(f), 434(a)(1) and (b)(2); take no further action with respect to Respondent in connection with 2 U.S.C. § 441b(a); approve the attached proposed Conciliation Agreement; and approve the appropriate letters.<sup>1</sup>

**II. BACKGROUND**

Based upon information contained in a referral from the Reports Analysis Division ("RAD") indicating that Respondent, while treasurer of the Giordano Congressional Exploratory Committee ("the Committee"), knowingly accepted excessive and prohibited contributions in connection with a \$300,000 bank loan made to the Committee and an intra-family contribution pledged as collateral for the loan, the Commission previously found reason to believe that Respondent violated 2 U.S.C. §§ 441a(f) and 441b(a) in his personal capacity.<sup>2</sup> In the ensuing investigation, the Commission issued a subpoena seeking information and documents from

<sup>1</sup> All of the facts in this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Federal Election Campaign Act of 1971, as amended ("the Act"), herein are as it read prior to the effective date of BCRA and all citations to the Commission's regulations herein are to the 2002 edition of Title 11, Code of Federal Regulations, which was published prior to the Commission's promulgation of any regulations under BCRA.

<sup>2</sup> On or about July 2000, the Giordano Congressional Exploratory Committee was superceded by the Giordano for US Senate Committee. See Letter from Respondent to the Commission dated October 28, 2000. For simplicity's sake, this Report does not differentiate between the two committees, and refers to both as "the Committee."

Respondent, including his knowledge of the bank loan and the certificate of deposit pledged as collateral for the loan. *See* Commission's subpoena dated October 27, 2004, at ¶¶ 2, 15(a)-(c), 16 and 20. In response, Respondent submitted an affidavit asserting his Fifth Amendment privilege against self-incrimination to each of the interrogatories and requests, and advised that he remained the subject of an ongoing criminal investigation by the United States Department of Justice ("DOJ") into possible criminal violations of the Act. Notwithstanding the claim of privilege, Respondent has requested pre-probable cause conciliation pursuant to 11 C.F.R. § 111.18(d) to resolve the matter.

The investigation revealed that the loan from Patriot National Bank ("PNB") to the Committee was made in the ordinary course of business and on a basis that assures repayment.<sup>3</sup> *See* General Counsel's Report # 8, at pp. 4-8. Accordingly, we recommend that the Commission take no further action with respect to Respondent in connection with his acceptance of the bank loan. *See* 2 U.S.C. § 441b(a). The investigation further revealed evidence that Salvatore Trovato, the candidate's (Philip Giordano) father-in-law, made an excessive contribution to the Committee by gifting \$300,000 to Mr. and Mrs. Giordano, which was simultaneously placed in a certificate of deposit and pledged as collateral for the loan to the Committee. *See* General Counsel's Report # 9, dated July 14, 2005. For the reasons discussed *infra*, we recommend that the Commission enter into pre-probable cause conciliation with Respondent in connection with 2 U.S.C. §§ 441a(f), 434(a)(1) and (b)(2), and approve the attached proposed Conciliation Agreement

<sup>3</sup> On June 1, 2005, the Commission voted to take no further action with respect to PNB in connection with 2 U.S.C. § 441b(a) in this matter.

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**III. SUMMARY OF THE INVESTIGATION**

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3       **A.     *Information obtained from Salvatore Trovato and Dawn Giordano.***

4       In response to a Request for Additional Information (RAFI) from RAD requesting that  
5       the Committee remedy the excessive contribution from Mr. Trovato, Respondent submitted a  
6       letter dated October 28, 2000 describing the collateral pledged for the loan.<sup>5</sup> *See* Respondent's  
7       October 28, 2000 letter. Respondent's letter sets forth that Mr. Trovato's name no longer  
8       appeared on the bank documents, and "[t]herefore, the loan does not exceed donation limits." *Id.*  
9       His letter specifies that the collateral for the loan now included a \$300,000 certificate of deposit  
10      jointly held by the Giordanos. *Id.* According to his letter,

11                   The certificate of deposit was originally a family gift given to the  
12                   Giordano family. The timing of the gift coincided with a financial  
13                   event with the family. It was not related to the Senate committee and  
14                   would have happened regardless of the Senate race.

15      *Id.*

16           However, when we attempted to obtain information from family members, who  
17      seemingly would have knowledge of the "financial event in the family" as described in  
18      Respondent's letter, both Mr. Trovato and Mrs. Giordano responded that they were not aware of  
19      any "financial event" as described in the letter.<sup>6</sup> *See* Response of Salvatore Trovato dated March  
20      30, 2005; *see also* Response of Dawn Giordano dated March 28, 2005.

<sup>5</sup> Mr. Trovato's name appeared as a co-guarantor on the original loan from PNB to the Committee. *See* RAFI dated September 19, 2000.

<sup>6</sup> Philip Giordano did not provide a response to the Commission's reason-to-believe notification letter.

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1           We believe that if Respondent had any information to the contrary, substantiating his  
2   allegations that the certificate of deposit was a family gift made irrespective of the campaign, he  
3   would have provided such exculpatory information to us. *See* 2 U.S.C. § 441a(f). However, he  
4   has refused to provide us any information regarding his knowledge of, or role in the bank loan  
5   transaction and the certificate of deposit, asserting his Fifth Amendment privilege claim.  
6   *See* Affidavit of James S. Paolino dated December 15, 2004, at ¶¶ 15 and 16. Therefore, we  
7   believe that it is reasonable to draw an adverse inference from Respondent's assertion of his  
8   privilege claim. *See* discussion *infra* at Section III.D.

9           ***B. Information obtained from Patriot National Bank.***

10          During the investigation, PNB President Philip W. Wolford submitted a sworn affidavit  
11   averring that the certificate of deposit was created and pledged on July 14, 2000 as collateral for  
12   the restructured loan to the Committee. Wolford Affidavit dated January 7, 2005, at ¶ 2(a). He  
13   further indicated that he discussed the need to restructure the initial loan to the Committee with  
14   "either or both" James Paolino and Thomas Ariola; and that "either or both" advised him that the  
15   Committee needed to restructure the existing loan to satisfy the Committee's compliance with  
16   federal election laws. *Id.* In addition, Mr. Wolford stated that "either or both" men proposed  
17   securing the restructured loan with a certificate of deposit from the Giordanos. Wolford  
18   Affidavit dated January 7, 2005, at ¶ 2(b). Respondent has asserted his privilege claim in  
19   response to questions regarding the identity of each person with whom he discussed the  
20   application and/or restructuring of the loan and the creation and purpose of the certificate of  
21   deposit. *See* Affidavit of James S. Paolino dated December 15, 2004, at ¶¶ 15 and 16.

22          In addition, Respondent appears to have provided a number of misstatements to RAD in  
23   the context of the \$300,000 loan to the Committee. The body of Respondent's October 28, 2000

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1 letter sets forth that the collateral for the loan was the certificate of deposit and real property  
2 owned by the Giordanos. However, there are Schedule C-1s attached to the disclosure reports  
3 included with Respondent's October 28, 2000 letter that indicate that the collateral for the loan  
4 was cash-on-deposit and future receipts. Both Schedule C-1s contain Respondent's name and  
5 signature as treasurer.

6 ***C. Information obtained from DOJ regarding the Committee's reports.***

7 Through the investigation we uncovered evidence that Respondent underreported the  
8 Committee's receipts by a total of \$21,425 on disclosure reports he prepared as treasurer.

9 *See* 2 U.S.C. §§ 434(a)(1) and (b)(2). According to the Committee's bank records and an FBI  
10 analysis of those records, \$8,000 in contributions from four BankNorth/Watson Group  
11 employees and their spouses was deposited in the Committee's bank account. *See* Attachment 1;  
12 *see also* General Counsel's Report # 5, dated January 14, 2005. Those contributions were made  
13 during the months of April and May 2000, but were not reported as part of the 2000 July  
14 Quarterly Report as required by law. *See* 2 U.S.C. § 434(b)(2); *see also* 11 C.F.R. § 104.3(a).  
15 Respondent, as treasurer at the time the contributions were made and deposited, and at the time  
16 the 2000 July Quarterly Report was filed, was responsible for reporting those contributions, but  
17 he did not. *See* 2 U.S.C. § 434(a)(1); *see also* 11 C.F.R. § 104.3(a).

18 The Commission's October 27, 2004 subpoena specifically asked Respondent about the  
19 BankNorth/Watson Group contributions, but Respondent refused to answer, invoking his Fifth  
20 Amendment privilege against self-incrimination. *See* Commission's October 27, 2004 subpoena,  
21 at ¶¶ 2, 17, 18, and 19; *see also* Affidavit of James S. Paolino dated December 15, 2004.

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Furthermore, Respondent's failure to report the \$8,000 has hindered the investigation into the BankNorth/Watson Group reimbursement scheme, since we were not able to locate the employees or confirm the contributions through the Committee's records. We became aware of the BankNorth/Watson Group scheme through the *sua sponte* submissions from BankNorth/Watson Group and Michael Watts. See letters to the Office of the General Counsel dated June 18, 2004 and June 7, 2004, respectively. Those submissions did not identify all of the employees involved in the scheme, and we were unable to turn to our internal resources because the contributions were not reported on the Committee's disclosure reports. Therefore, we had to learn this information later through other means including grand jury materials ordered released by the United States District Court in Connecticut.

The FBI financial analysis of the Committee's bank records also indicates that while Respondent was treasurer of the Committee, there was an additional \$13,425 in bank deposits that were not reported on FEC filings.<sup>8</sup> See Attachment 1. As treasurer, Respondent was required to disclose the total amount of all receipts received by the Committee. See 2 U.S.C. §§ 434(a)(1) and (b)(2) and 11 C.F.R. §§ 104.1(a) and 104.3(a). Respondent invoked his privilege against self-incrimination and refused to answer questions regarding his duties as treasurer and the identity all persons who were responsible for receiving or collecting contributions. See Commission's October 27, 2004 subpoena, at ¶¶ 2, and 19; see also Affidavit of James S. Paolino dated December 15, 2004.

<sup>8</sup> The applicable dates of deposit were April 18, 2000 through July 1, 2000. The 2000 April and July Quarterly Reports, on which those receipts should have been disclosed, bear Respondent's name and signature as treasurer.

**D. Respondent's refusal to provide information and documents in this investigation.**

The evidence indicating that Respondent accepted an excessive contribution and failed to report the Committee's total receipts is further bolstered by his refusal to answer discovery requests related to both issues. An adverse inference may be drawn from Respondent's decision to assert his Fifth Amendment privilege rather than provide an alternative explanation for the evidence uncovered during the investigation. The adverse inference rule provides a tool for courts and agencies to infer that when a party fails to produce relevant information within his or her control, then the information is unfavorable to that party. *See generally* Memorandum to the Commission Regarding Adverse Inference, dated October 27, 2003. It would be appropriate for the Commission to draw an adverse inference from this Respondent's Fifth Amendment claim of privilege. In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Supreme Court upheld a state prison disciplinary board's decision to sanction an inmate, where the board's decision was based in part on the adverse inference drawn from the inmate's exercise of his right to remain silent. The *Baxter* decision has been applied in numerous civil cases outside of the prison context. *See e.g., SEC v. Interlink Data Network*, 1993 WL-603274 (C.D. Cal. 1993); *United States v. Ianniello*, 646 F. Supp. 1289 (S.D.N.Y. 1986); *SEC v. Musella*, 578 F. Supp. 425, 429 (S.D.N.Y. 1984), *aff'd*, 898 F.2d 138 (2d Cir. 1990). Courts have permitted the adverse inference to be drawn when it is given no more evidentiary value than warranted by the other evidence in the case, and when it does not result in an "automatic penalty" such as summary judgment. *See Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) and discussion in *SEC v. Tome*, 638 F. Supp.

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IV. DISCUSSION OF CONCILIATION PROVISIONS AND CIVIL PENALTY

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V. RECOMMENDATIONS

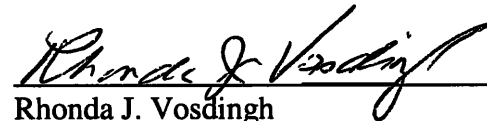
1. Enter into conciliation with James S. Paolino prior to a finding of probable cause to believe in connection with 2 U.S.C. §§ 441a(f), 434(a)(1) and (b)(2).
2. Take no further action with respect to Respondent in connection with 2 U.S.C. § 441b(a).
3. Approve the attached proposed Conciliation Agreement.
4. Approve the appropriate letters.

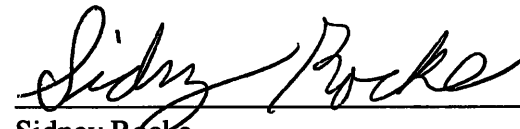
Lawrence H. Norton  
General Counsel

Date

8/23/05

BY:

  
Rhonda J. Vosdingh  
Associate General Counsel for Enforcement

  
Sidney Rooke  
Assistant General Counsel

  
Christine C. Gallagher  
Attorney

Attachments

1. FBI Financial Analysis
2. Proposed Conciliation Agreement

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ATTACHMENT 1 HAS BEEN REMOVED